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No. 93-1327

In the Supreme Court of the United States

OCTOBER TERM, 1993

JERRY L. BRANCH, ET AL., PETITIONERS

v.

DALE L. TUNNELL, INDIVIDUALLY AND AS SPECIAL AGENT OF THE BUREAU OF LAND MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of a claim under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), challenging the veracity of a warrant affidavit where the complaint identified no material falsehood in the affidavit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 14 F.3d 449, and a prior opinion (Pet. App. 1b-15b) is reported at 937 F.2d 1382. The memorandum opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1994. The petition for a writ of certiorari was filed on February 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent, Dale L. Tunnell, is a Special Agent with the Bureau of Land Management (BLM) of the Department of the Interior. BLM is responsible for investigating allegations of fraudulent underreporting of royalties owed to the government on federal natural gas and oil leases. In April, 1987, Tunnell began investigating whether Branch Oil & Gas Company (Branch Oil) was avoiding royalty payments on its federal leases. Pet. App. 4a.

Royalties on federal leases are calculated according to the price at which the lessee sells the oil or gas it extracts under the lease.[1] Tunnell had previously uncovered a scheme involving another company that had sold natural gas at below-market prices to a shell corporation, paid royalties based on those artificially low prices, and then had the shell resell the gas at significantly higher prices. He suspected that Branch Oil might be engaged in a similar scheme with Aloe Ventures Gathering System (Aloe Ventures). Branch Oil was the managing partner of, and owned a controlling interest in, Aloe Ventures. Pet. App. 4a-5a.

On July 15, 1987, Tunnell obtained warrants from a United States Magistrate to search the office of Branch Oil and the home of the company's president and owner, petitioner Jerry L. Branch. During his investigation of Branch Oil, Tunnell had discovered that Aloe Ventures was in an ongoing dispute with the Montana Department of Revenue (MDOR) over whether the state was entitled to review certain internal records as part of an

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[1] See Mineral Lands Leasing Act, 30 U.S.C. 181-287 (regarding production of oil and gas pursuant to federal leases); 30 C.F.R. 206.152 (1989) (regarding calculation of royalties).

oil and gas production-tax audit. In support of the application for the search warrants, Tunnell submitted a four-page, single-spaced affidavit, relying substantially on information obtained from Peter Donnelly, an agent with the MDOR. *Id.* at 4a-5a. See C.A. App. 14-17 (Affidavit for Search Warrant).

The affidavit summarized Tunnell's background as an investigator and his tenure in his current job, and referred to his prior experience investigating various schemes to defraud the government of royalties and taxes. The affidavit stated that Tunnell had received information from agent Donnelly "relating to fraud and false statements" by Branch Oil, Jerry Branch, and Aloe Ventures concerning their royalty and tax obligations. C.A. App. 14. It also referred to specific corroborating information, including the following: (1) employee statements and documents from the Department of the Interior's Bureau of Land Management and Minerals Management Service about oil company practices that comply with federal law; (2) documentation resulting from "a limited royalty audit" of Branch Oil by MDOR; (3) Donnelly's July 14, 1987, notification to Tunnell that an audit in which Donnelly assisted disclosed that Branch Oil underpaid federal royalties by $13,713.05, and that it did so by selling natural gas to Aloe Ventures, which in turn sold it at a higher price to Montana Power Company; (4) MDOR's estimates, based on uncompleted audits of 24 other federal leases owned by Branch Oil, that Branch underpaid royalties by $ 500,000; (5) documentation provided by Donnelly showing that Branch Oil sold its natural gas at prices substantially lower than those obtained by producers in the surrounding production field; (6) documents showing that Branch Oil's royalties were in fact paid based on prices obtained in sales of natural gas to Aloe Ventures,

and that the companies "refus[ed] to provide * * * supporting documentation" despite "[n]umerous attempts" by MDOR; (7) Aloe Ventures' reliance, in support of its nondisclosure of documents, on the assertion "that Branch Oil and Gas Company and Aloe Ventures Gathering System were separate entities," notwithstanding correspondence and documents reflecting a common address and telephone number for both companies; (8) information provided by the County Assessor's Office confirming that the common address was a building owned by Jerry L. and Sylvia L. Branch, whose residence phone number was the same as the number listed on the correspondence for the two businesses; (9) documents identifying Branch as the owner of the controlling interest in Aloe Ventures; (10) Tunnell's own familiarity with less-than-arms'-length transactions, whereby "a group of well owners sell the natural gas production to themselves to reduce overall tax and royalty liability," his own familiarity with the refusal of companies engaged in fraud to produce documents upon request, and his own conclusion that the activities of Branch matched this pattern. C.A. App. 14-17.

On July 16, 1987, Tunnell and other officers searched Branch's home and office. No criminal charges were filed. Pet. App. 5a.

2. On June 22, 1988, Branch sued Tunnell under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), seeking money damages for violation of his Fourth Amendment right to be free from unreasonable searches and seizures. He alleged that Tunnell had included in his warrant affidavit information that he knew or should have known to be false. Branch took the depositions of agent Donnelly and MDOR Director John LaFaver. Tunnell moved to stay discovery and to

dismiss the complaint on grounds of qualified immunity. Pet. App. 5a-6a, 6b-7b.

The district court granted the stay of discovery but denied the motion to dismiss. The court observed that "[t]he defense of qualified immunity usually turns on the circumstances and motivations of the defendant," and that a complaint that alleges motive ordinarily cannot be dismissed for failure to state a claim. See Pet. App. 6b. The court accordingly held that "[b]ecause there exist genuine issues of material fact regarding Tunnel's [sic] claim of qualified immunity, the court is constrained to deny the motion to dismiss." *Ibid.* Tunnell then moved for summary judgment, again on grounds of qualified immunity, and to continue the discovery stay. The district court denied the stay and took the summary judgment motion under advisement pending further discovery. *Id.* at 7b.

3. On interlocutory review of the denial of the motion to dismiss, the court of appeals reversed. Pet. App. 1b-15b. The court held that where motive or intent is an essential element of a constitutional tort claim against an official protected by qualified immunity, the plaintiff must meet a heightened standard of pleading. *Id.* at 11b. "[B]are allegations of improper purpose are insufficient to subject government officials to discovery and the related burdens of defending a lawsuit." *Ibid.* To survive a motion to dismiss, the plaintiff must "put forward nonconclusory allegations of subjective motivation, supported either by direct *or* circumstantial evidence, before discovery may be had." *Id.* at 12b. The court explained that "[o]nce a plaintiff has met this threshold requirement, the district court may, if it believes discovery is warranted, allow the plaintiff to engage in narrowly tailored discovery, supervising the discovery process to avoid unnecessary burdens upon the

defendants." *Ibid.* (citing *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987)).

The court of appeals determined that a heightened pleading standard should apply in this case because Branch's claim "turns on the ability of the plaintiff to establish that the defendant knowingly or recklessly misled the magistrate." Pet. App. 13b. The court held that, to survive a motion to dismiss, Branch must: (1) "point out specifically the portion of the warrant affidavit that is claimed to be false," (2) "allege some facts tending to show that the defendant was aware or should have been aware of the falsity of those statements," and (3) show that the false statements were "necessary to the finding of probable cause." *Id.* at 14b (quoting *Franks* v. *Delaware*, 438 U.S. 154, 156, 171 (1978)). The court characterized this standard as "a low one," Pet App. 14b, but concluded that it had not been met, and remanded to allow Branch the opportunity to amend his complaint. *Id.* at 15b.

4. On remand, relying on the discovery he had obtained, Branch added to his complaint allegations focusing on discrepancies he perceived between Donnelly's statements at his deposition and in an affidavit he prepared for the litigation, on the one hand, and the information attributed to Donnelly in Tunnell's warrant affidavit, on the other. The amended complaint alleged that Donnelly, at his deposition, had disavowed the statements attributed to him as being "either factually inaccurate or * * * never made at all," and specified that, in his affidavit, Donnelly contradicted or retreated from statements attributed to him in the warrant affidavit. C.A. App. 8.

The district court dismissed the amended complaint for failure to state a claim. The court found that petitioner had satisfied the first prong of the heightened

pleading test by specifying those portions of the warrant affidavit that he believed were false. The court held, however, that the complaint failed to allege facts tending to show that respondent was aware, or should have been aware, of their falsity. C.A. App. 32-35. The court explained:

> Donnelly's deposition testimony when considered as a whole, does not tend to show that Tunnell misrepresented, in the text of his affidavit, the substance of the information that Donnelly provided him. There exists no indication that the conclusions drawn by Tunnell upon his consideration of that information together with his review of pertinent documentation, were false.

Id. at 35.

5. Branch appealed, and the court of appeals affirmed. The court noted that, after its earlier decision, this Court in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), rejected a heightened pleading requirement in a suit brought against a municipality under 42 U.S.C. 1983. *Leatherman* itself, however, expressly reserved the question whether a heightened pleading rule might apply in cases involving qualified immunity. 113 S. Ct. at 1162. Relying on that express reservation, and noting the post-*Leatherman* decision of the District of Columbia Circuit continuing to apply a heightened intent-pleading standard in qualified immunity cases, see *Kimberlin* v. *Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993), the court of appeals reaffirmed its heightened pleading standard. Pet. App. 16a-17a.

Reviewing the amended complaint, the court held that the discovery materials relied on and effectively incorporated into that complaint failed to meet the

applicable pleading standard. The allegations fell short of showing that Tunnell knowingly made false statements in the warrant affidavit. Pet. App. 11a-14a.[2] The court stated that the additional allegations pointed to only "trivial" discrepancies between the warrant affidavit and Donnelly's deposition. *Id.* at 12a. For example, Tunnell had averred that Donnelly told him of suspected federal law violations; Donnelly, however, had disavowed knowledge of the legal requirements of federal statutes. *Ibid.* Tunnell had also described Branch as owning the federal leases outright, whereas Donnelly had said that Branch owned the controlling interest in them. *Id.* at 12a-13a. In addition, Tunnell had asserted that Branch Oil's and Aloe's documents showed the same business address; Branch attempted to show that to be false by pointing to separate listings for the two businesses in the telephone directory. *Id.* at 12a-14a. The court concluded that the discrepancies between the warrant affidavit and information provided by Donnelly in the litigation, to the extent there were any, failed to show that Tunnell knew or should have known that he was making a false statement. *Id.* at 14a.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the dismissal of his complaint. Pet. 5-15. There is no merit to that contention; nor does this case otherwise warrant this Court's review.

1. The court of appeals made its qualified immunity determination in precisely the manner this Court

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[2] The court viewed Donnelly's deposition and Tunnell's own 1989 affidavit, which were of unquestioned authenticity and were discussed in the complaint, as incorporated in the complaint for purposes of the motion to dismiss. Pet. App. 10a-11a.

specified in *Anderson* v. *Creighton*, 483 U.S. 635 (1987). *Anderson* explained how a court should evaluate a qualified immunity defense at the earliest possible stage in the litigation: First, the court should decide whether the actions as alleged in the complaint "are actions that a reasonable official could have believed lawful." *Id.* at 646 n.6. If they are, it should dismiss the case. *Ibid.* If they are not, "then discovery may be necessary before [the official's] motion for summary judgment on qualified immunity grounds can be resolved." *Ibid.* The Court further cautioned that "such discovery should be tailored specifically to the question of [the official's] qualified immunity." *Ibid.*

Petitioner received the full benefit of the procedure described in *Anderson*. The court of appeals evaluated the immunity defense based on the amended pleadings. Before any heightened pleading requirement was imposed, the district court allowed plaintiff to engage in some discovery, including depositions of Montana Department of Revenue agent Donnelly and MDOR Director John LaFaver. The discovery was, as contemplated by *Anderson*, "tailored" to the issue crucial to determining the viability of Branch's claim: whether, as Branch alleged, Tunnell had falsified the information that he asserted agent Donnelly had provided him. Once the results of discovery were considered, the court correctly concluded that Branch had no viable claim.

Petitioner thus has failed to identify any respect in which a lower pleading standard would have affected the outcome of this case. He has also not identified any circuit with a more lenient pleading standard for *Bivens* unconstitutional motive claims than the standard the court of appeals applied here. On the contrary, the courts of appeals have generally articulated heightened pleading standards in terms at least as demanding as the

Ninth Circuit's requirement that the complaint contain more than "[b]are allegations of improper purpose." Pet. App. 11b. See, *e.g.*, *Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990) (requiring pleading "with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent"), aff'd on other grounds, 500 U.S. 226 (1991); *Elliott* v. *Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991) (requiring "specific, nonconclusory factual allegations" establishing the necessary mental state), cert. denied, 112 S. Ct. 973, 1242 (1992); *Elliott* v. *Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) (requiring "a detailed complaint alleging with particularity all material facts on which [plaintiff] contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained"). Petitioner thus cannot contend that his complaint would survive the pleading standard applied by any other circuit to *Bivens* cases claiming unconstitutional motive.

Petitioner relies solely on *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), which held that heightened pleading of claims against municipalities under 42 U.S.C. 1983 is not required. The Court in *Leatherman*, however, expressly declined to rule on the issue of heightened pleading in qualified immunity cases. 113 S. Ct. at 1162. Emphasizing that the case before it involved a municipal defendant not entitled to any immunity, the Court stated that "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Ibid.*

There is no reason for this Court to review the decision below in light of *Leatherman*. No circuit conflict

has developed since that decision was announced. The only court of appeals, other than the court below, to address the issue in the aftermath of *Leatherman* has adhered to the heightened pleading standard it had established prior to that decision. See *Kimberlin* v. *Quinlan*, 6 F.3d 789 (D.C. Cir. 1993).

2. This case is, moreover, not an appropriate vehicle for addressing whether, in cases in which a qualified immunity defense is raised, *Leatherman* should be extended to invalidate rules demanding heightened pleading as a prerequisite to discovery. Petitioner here obtained discovery before any "heightened pleading" standard was applied to his claim, and he identifies no further information that he would have sought to discover that could establish an unconstitutional motive. This case thus does not present for review any issue of general importance regarding the propriety of imposing a heightened pleading threshold in circumstances where such a standard might prevent relevant discovery.

3. A writ of certiorari is particularly unwarranted here because the amended complaint apparently failed to state a claim even in the absence of a heightened pleading standard. It is true that the court of appeals stated in passing that the complaint would have passed muster under "the familiar standard of *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)," Pet. App. 14a, but the court's own analysis casts serious doubt on the correctness of that conclusion.

Petitioner failed to plead that the challenged search warrant was false in any respect sufficiently material to affect the probable cause determination. A claim that a warrant was unconstitutionally procured with misinformation must allege not only that the officer knew or should have known that information he supplied was false, but also that "no accurate information sufficient to

constitute probable cause attended the false statements." *Olson* v. *Tyler*, 771 F.2d 277, 281 (7th Cir. 1985). Once the Donnelly deposition and declaration of MDOR agent Donnelly were incorporated into the complaint, as both courts below held they properly should be, Pet. App. 10a-11a; C.A. App. 33 n.6, the adequacy of the warrant affidavit became apparent, regardless of the specific falsehoods Branch alleged.

Any discrepancies between the information Donnelly supplied and that which Tunnell attributed to him in the warrant affidavit, even if the discrepancies were intentional, were nevertheless "trivial." Pet. App. 12a. The court of appeals explained in detail why each alleged falsehood was inconsequential to the overall veracity of the warrant affidavit. *Id.* at 11a-14a. Thus, even assuming the truth of Branch's allegations that the challenged portions of the affidavit were false, there was ample basis for the issuance of the search warrant. The amended complaint thus would have called for dismissal under any pleading standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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